

**CHILDREN'S HEALTH INSURANCE PROGRAM
MARKETING/MEDIA SERVICES AGREEMENT
BETWEEN THE
HEALTH & HUMAN SERVICES COMMISSION
AND
SHERRY MATTHEWS, INCORPORATED**

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STATE OF TEXAS

COUNTY OF TRAVIS

**CHILDREN'S HEALTH INSURANCE PROGRAM
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HEALTH & HUMAN SERVICES COMMISSION
AND
SHERRY MATTHEWS, INCORPORATED**

Article 1. INTRODUCTION

THIS SERVICES AGREEMENT (the "Agreement") is entered into this 1st day of November, 1999 (the "Effective Date"), between the HEALTH AND HUMAN SERVICES COMMISSION ("HHSC"), an administrative agency within the executive department of the State of Texas and having its principal office at 4900 North Lamar Boulevard, 4th Floor, Austin Texas 78751, and SHERRY MATTHEWS, INCORPORATED, d/b/a SHERRY MATTHEWS ADVERTISING & PUBLIC RELATIONS ("CONTRACTOR"), a corporation organized under the laws of the State of Texas and having its principal office at 101 San Jacinto Boulevard, Austin, Texas 78701. HHSC and the CONTRACTOR may be referred to in this Agreement individually as a "Party" and collectively as the "Parties."

The Parties agree that the following terms and conditions apply to the services to be provided by the CONTRACTOR under this Agreement in consideration of certain payments to be made by HHSC.

Article 2. BACKGROUND, INDUCEMENTS AND OBJECTIVES

Section 2.01 Background.

(a) Federal legislative authorization.

This Agreement is entered into in connection with the Texas Legislature's decision to participate in the federally authorized State Children's Health Insurance Program ("CHIP"). CHIP is authorized under Title XXI of the federal Social Security Act, 42 U.S.C. §§ 1397aa-1397jj. The CHIP program is an optional joint state-federal program designed to provide affordable insurance to low income families with uninsured children.

(b) State enabling legislation.

Approximately 1.4 million children in Texas are uninsured. The costs, both economic and social, to the State of Texas are immeasurable. In recognition of this need the 76th Texas Legislature authorized the state's participation in the CHIP program. The enabling legislation, [Senate Bill 445](#), is codified as Chapter 62, Health & Safety Code. The principal objective of the state legislation is to provide primary and preventative health care to low-income, uninsured children of Texas, including children with special health care needs, who are not served by or eligible for other state-assisted health insurance programs.

(c) State child health plan.

Under [chapter 62](#), HHSC is directed to develop and file with the federal government a state-designed health plan program that ensures the state's eligibility for federal funding under Title XXI of the Social Security Act. HHSC has delivered a plan to the federal government for approval. HHSC desires the participation of qualified organizations to assist with the implementation of the plan in Texas.

(d) Participation of the private sector.

As expressed in [section 62.055](#), Health & Safety Code, it is the intent of the Texas Legislature that HHSC, in administering the state child health plan, maximize the use of private resources, including nonprofit organizations. In fulfilling this mandate, HHSC has solicited assistance with many aspects of the program, including development of a media and marketing campaign to increase public awareness of CHIP.

(e) Procurement of media/marketing services.

HHSC solicited proposals for media and marketing services to CHIP through a [Request for Proposals](#) ("RFP") dated July 17, 1999. The procurement that is the subject of this Agreement is undertaken as a "best value" procurement under the terms of [Chapter 531](#), Texas Government Code, [Chapter 62](#), Health & Safety Code, and [Section 2155.144](#), Government Code. In response to the RFP, CONTRACTOR submitted its Proposal, dated September 7, 1999 (the "[Proposal](#)"). Following review of proposals ("[Phase 1 review](#)"), HHSC selected several proposers, including CONTRACTOR, to participate in oral presentations and production of proposed deliverables for consideration by evaluators appointed by HHSC ("[Phase 2 Review](#)"). The evaluators recommended CONTRACTOR's Proposal as the best value for the state. HHSC desires to implement the terms of CONTRACTOR's Proposal, subject to the terms and conditions of this Agreement.

Section 2.02 Inducements.

In making the award of this Agreement, HHSC relies on CONTRACTOR's assurances of the following:

(1) CONTRACTOR, including its subcontractors, is an established provider of a broad range of media, public relations, and advertising services;

(2) CONTRACTOR has the skills, qualifications, expertise, financial resources and experience necessary to perform the services described in the Request For Proposals, CONTRACTOR's Proposal and this Agreement in an efficient, cost-effective manner, with a high degree of quality and responsiveness, and has performed similar services for other public or private entities;

(3) CONTRACTOR has thoroughly reviewed, analyzed and understood the Request for Proposals and has had the opportunity to review and fully understand the State's current program and operating environment for the marketing and media activities that are the subject of this Agreement and the needs and requirements of the State during the Agreement term;

(4) CONTRACTOR has had the opportunity to review and fully understand the State's stated objectives in entering into this Agreement and, based on such review and understanding, CONTRACTOR currently has the capability to perform in accordance with the terms and conditions of this Agreement;

(5) CONTRACTOR also has reviewed and understands the risks associated with the CHIP program as described in the Request for Proposals, including the risk of non-appropriation of funds.

Accordingly, on the basis of the terms and conditions of this Agreement, HHSC desires to engage CONTRACTOR to perform the services described in this Agreement under the terms and conditions set forth in this Agreement.

Section 2.03 Mission Objectives.

CONTRACTOR acknowledges its understanding that HHSC's overall objective in engaging CONTRACTOR pursuant to this Agreement is to enhance the public identification of CHIP and maximize the enrollment of eligible families in CHIP through a statewide multimedia campaign that is developed and conducted by CONTRACTOR. The multimedia campaign developed by CONTRACTOR will be operated in a highly efficient and effective manner on behalf of HHSC, the state administrative agencies operating portions of the CHIP program in Texas, and the members of the CHIP program. In particular, CONTRACTOR acknowledges its understanding of HHSC's desire to achieve the following primary Mission Objectives:

(1) Development of a statewide multimedia campaign built around a recognizable, innovative, tested, and effective logo and slogan that:

(A) Informs families of uninsured children of the availability of affordable child health insurance;

(B) Motivates these families to apply for insurance through a toll-free number or by mail;

(C) Informs families of the availability of assistance with applications from community-based organizations ("CBOs");

(D) Reflects cultural competency and the state's cultural diversity; and

(E) Builds upon current and former research and testing conducted by the state;

(2) Facilitation of the participation of CBOs in the outreach and marketing of CHIP to special communities;

(3) Acquisition of effective free and paid media; and

(4) Verification of the placement and effectiveness of the statewide multimedia campaign through "post-buy analysis" and other acceptable forms of documentation.

Section 2.04 *Desired benefits.*

CONTRACTOR understands that as a result of the CONTRACTOR's operation of the CHIP Media and Marketing Services, HHSC anticipates and CONTRACTOR is committed to assist HHSC achieve, the following desired benefits for the State of Texas:

(1) High quality, flexible media and marketing services in the areas described in this Agreement provided in a more cost-effective manner and with a substantially higher degree of effectiveness than can currently be provided by the State;

(2) Creative communications strategies and processes that provide the State of Texas the following:

(A) Maximum public awareness of and access to CHIP;

(B) Effective coordination and distribution of media and marketing materials across the state; and

(C) The opportunity to generate reliable data which allows the State to evaluate public awareness and education of the CHIP program and improve the enrollment of eligible families in to the program;

(3) A flexible relationship between HHSC and the CONTRACTOR under which the CONTRACTOR will be highly responsive to the needs and requests of HHSC and to changes in methods and strategies for providing services; and

- (4) Continuous identification of methods to improve services and reduce costs.

Section 2.05 Construction of Agreement.

(a) Scope of Article.

The provisions of this Article 2 are intended to be a general introduction to this Agreement and are not intended to expand the scope of the Parties' obligations under this Agreement or to alter the plain meaning of the terms and conditions of this Agreement. For purposes of this transaction, HHSC is the contracting agency acting on behalf of the Texas Children's Health Insurance Program. References in this Agreement to the State are interpreted, as appropriate, to mean or include HHSC and other State agencies that may participate in the administration of CHIP, provided, however, that no provision will be interpreted to include any entity other than HHSC as the contracting agency.

(b) Severability.

If any provision of this Agreement is construed to be illegal or invalid, such interpretation will not affect the legality or validity of any of its other provisions. The illegal or invalid provision will be deemed stricken and deleted to the same extent and effect as if never incorporated in this Agreement, but all other provisions will remain in full force and effect.

(c) Survival of terms.

Termination or expiration of this Agreement for any reason will not release either Party from any liabilities or obligations set forth in this Agreement that:

- (1) The Parties have expressly agreed shall survive any such termination or expiration; or
- (2) Remain to be performed or by their nature would be intended to be applicable following any such termination or expiration.

(d) Headings.

The Article and Section headings in this Agreement are for reference and convenience only and may not be considered in the interpretation of this Agreement.

(e) Global drafting conventions.

- (1) The terms "include," "includes," and "including" are terms of inclusion, and where used in this Agreement, are deemed to be followed by the words "without limitation."
- (2) Any references to "Sections," "Exhibits," or "Attachments" are deemed to be references to Sections, Exhibits, or Attachments to this Agreement.

(3) Any references to agreements, contracts, statutes, or administrative rules or regulations in this Agreement are deemed references to these documents as amended, modified, or supplemented from time to time during the term of this Agreement.

Section 2.06 *Time of the essence.*

In consideration of the time limits for implementation of the CHIP, time is of the essence on the performance of the Services under this Agreement.

Section 2.07 *No implied authority.*

The authority delegated to CONTRACTOR by HHSC is limited to the terms of this Agreement. HHSC is the state agency designated by the Texas Legislature to administer the Texas Children's Health Insurance Program, and no other agency of the State grants CONTRACTOR any authority unless directed through HHSC. CONTRACTOR may not rely upon implied authority, and specifically is not delegated authority under this Agreement to:

- (1) make public policy;
- (2) promulgate, amend or disregard administrative regulations or program policy decisions made by State and federal agencies responsible for administration of the Medicaid program; or
- (3) unilaterally communicate or negotiate with any federal or state agency or the Texas Legislature on behalf of HHSC regarding the CHIP program.

CONTRACTOR is required to cooperate to the fullest extent to assist HHSC in communications and negotiations with state and federal agencies as directed by HHSC.

Section 2.08 *Legal Authority.*

(a) HHSC is authorized to enter into this Agreement under [Section 531.039](#) of Chapter 531, Texas Government Code, Chapter 62, Texas Health & Safety Code, and Section 2155.144, Texas Government Code. CONTRACTOR is authorized to enter into this Agreement pursuant to the authorization of its governing board or controlling owner or officer.

(b) The person or persons signing and executing this Agreement on behalf of HHSC, or representing themselves as signing and executing this Agreement on behalf of HHSC, warrant and guarantee that he, she, or they have been duly authorized by HHSC to execute this Agreement on behalf of HHSC and to validly and legally bind HHSC to all of its terms, performances, and provisions.

Accordingly, unless otherwise specified in this Agreement, CONTRACTOR assures compliance with the following terms and conditions:

Article 3. DEFINITIONS.

As used in this Agreement, the following terms and conditions shall have the meanings assigned below:

“Agreement” means this formal, written, and legally enforceable agreement between the Parties that is awarded pursuant to state law and in accordance with the procurement solicitation instrument entitled "[Children's Health Insurance Program, Media/Marketing Services Request for Proposals](#)," issued by HHSC on July 17, 1999.

“Approved Subcontractors” means third party service providers contracted by the CONTRACTOR to perform any part of the Services under this Agreement or to fulfill in whole or in part a duty of the CONTRACTOR under this Agreement and that have been approved by HHSC as acceptable subcontractors.

“Change” means any alteration, adjustment, exchange, substitution, or modification of the Services under this Agreement that are authorized in accordance with [Article 8](#) of this Agreement.

“Change Order” means an authorization to make a Change in the Services or Deliverables under this Agreement.

“Commissioner” means the Commissioner of Health and Human Services.

“Confidential Information” means any communication or record (whether oral, written, electronically stored or transmitted, or in any other form) that consists of:

- (a) Information relating to applicants or recipients of services or benefits under public programs included within the scope of the CHIP Program;
- (b) All non-public budget, expense, payment and other financial information;
- (c) Any privileged work product;
- (d) Any information identified by HHSC as confidential or not subject to required public disclosure for purposes of [Chapter 552](#), Texas Government Code;
- (e) Unless previously publicly disclosed by HHSC or another State agency or authorized by HHSC, the substance and content of any CHIP program guidance or manual; and
- (f) Information that is utilized, developed, received, or maintained by HHSC, the CONTRACTOR, or participating state agencies for the purpose of fulfilling a duty or obligation under this Agreement and that has not previously been publicly disclosed.

“CONTRACTOR” means Sherry Matthews, Incorporated, a corporation organized under the laws of the State of Texas and doing business as Sherry Matthews Advertising & Public Relations.

“CONTRACTOR Project Manager” means the full-time CONTRACTOR employee who is designated to serve as the primary CONTRACTOR contact in accordance with [Section 5.01](#) of this Agreement.

“Corrective Action Plan” means the detailed written plan required by HHSC to correct or resolve a deficiency or event causing the assessment of a liquidated damage against CONTRACTOR.

“Deliverable” means a written or recorded work product prepared, developed, or procured by CONTRACTOR as part of the Services under this Agreement for the use or benefit of HHSC or the State of Texas and identified in [Article 7](#) of this Agreement.

“Effective Date” means November 1, 1999. For purposes of this Agreement, the term includes any period under which work is performed in accordance with a properly executed Letter of Intent between HHSC and CONTRACTOR.

“Expiration Date” means August 31, 2001.

“Force majeure event” means any failure or delay in performance of a duty by a Party under this Agreement that is caused by fire, flood, earthquake, an act of God, an act of war, riot, civil disorder, or any similar event beyond the reasonable control of such Party and without the fault or negligence of such Party.

“Initial Term” means the period between the Effective Date and the original Expiration Date of this Agreement.

“Key CONTRACTOR Personnel” means the critical management and technical positions identified by CONTRACTOR in its Proposal and subject to the approval and oversight of HHSC in accordance with [Section 5.03](#) of this Agreement.

“Management Services Contractor” means the entity contracted by HHSC to manage CHIP service contracts.

“Parties” means HHSC and the CONTRACTOR, collectively.

“Party” means either HHSC or the CONTRACTOR, individually.

“Project Budget” means the detailed financial budget prepared by CONTRACTOR and approved by HHSC that details the estimated costs for delivery of the Services under this Agreement.

“Proposal” means the proposal submitted by the CONTRACTOR in response to the Media/Marketing Request for Proposals.

“Public information” means information that:

(1) Is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body or for a governmental body; and

(2) The governmental body owns or has a right of access to.

“Request for Proposals” or **“RFP”** means the procurement solicitation instrument entitled **“Children's Health Insurance Program, Media/Marketing Services Request for Proposals,”** issued by HHSC on July 17, 1999, and under which this Agreement was awarded and is executed. The term includes all modifications, amendments, revisions, and errata to the **RFP** published by HHSC.

“Scope of Work” means the description of Services and Deliverables specified in Part V of the **RFP**, CONTRACTOR's Proposal, and **Article 7** of this Agreement.

“Services” means the tasks, functions, and responsibilities assigned and delegated to the CONTRACTOR under this Agreement and described in **Article 7** of this Agreement, and any ancillary or incidental tasks, functions or responsibilities not otherwise expressly described in this Agreement but which are customary or required for the proper performance or delivery of the Services.

“Transition Plan” means the written plan developed by CONTRACTOR, approved by HHSC, and to be employed in the event of an early termination of this Agreement. The Transition Plan describes CONTRACTOR's policies and procedures that will assure:

(1) All account and creative services are maintained during the transition to a substitute service provider for media and marketing services to the CHIP; and

(2) All electronic data, creative work, and physical records are accurately and completely transferred to the substitute service provider.

Article 4. GENERAL TERMS AND CONDITIONS

Section 4.01 *Term of the Agreement.*

(a) General provisions.

This Section 4.01 will govern the period for performance of this Agreement. No commitment of funds is permitted prior to the first day or subsequent to the last day of the Initial Term and any properly executed extension of the Initial Term unless authorized under a properly executed Letter

of Intent between HHSC and CONTRACTOR. The term may be extended or shortened by amendment.

(b) Initial Term.

The Initial Term of this Agreement will cover Services performed between November 1, 1999, and August 31, 2001 (“the Expiration Date”), and will terminate on the Expiration Date, unless terminated sooner or extended in accordance with the terms of this Agreement. The Initial Term includes any period during which work is performed under a Letter of Intent that is properly executed between HHSC and CONTRACTOR.

(c) Optional extension of Agreement.

HHSC may extend the term of this Agreement by written notice to the CONTRACTOR at least 90 days before the Expiration Date. The duration of the extension shall be one (1) year.

(d) Modifications upon extension or renewal of Agreement.

(1) If HHSC seeks modifications to the Agreement as a condition of any extension, HHSC's notice to the CONTRACTOR will specify those modifications to the Scope of Work, the Agreement pricing terms, or other terms and conditions of the Agreement HHSC seeks.

(2) Modifications proposed by HHSC may apply to operations under this Agreement in any Agreement year beginning after the date of notice to the CONTRACTOR. CONTRACTOR must respond to HHSC's proposed modification within 30 days of receipt. Upon receipt of the CONTRACTOR's response to the proposed modifications, HHSC may enter into negotiations with the CONTRACTOR to arrive at mutually agreeable Agreement modifications. If HHSC determines that the Parties will be unable to reach agreement on mutually satisfactory Agreement modifications, then HHSC must provide written notice to the CONTRACTOR of its intent not to extend the Agreement beyond the Agreement term then in effect, at least 45 days before the Agreement Expiration Date, inclusive of all extension options previously exercised.

(e) Transitional assistance.

Upon receipt of notice of termination of this Agreement by HHSC, the CONTRACTOR must provide the transitional assistance specified in the Transition Plan referenced in [Article 7](#) of this Agreement.

Section 4.02 Scope of work.

(a) CONTRACTOR will perform the work outlined in the Scope of Work contained in the RFP, CONTRACTOR's Proposal, the modifications to the Proposal (“Modifications to”

CONTRACTOR's Proposal"), and the additional services offered by CONTRACTOR as a value-added service (the "Schedule of Value-Added Services").

(b) The RFP, CONTRACTOR's Proposal, Modifications to CONTRACTOR's Proposal, and "Schedule of Value-Added Services" are hereby incorporated into this Agreement for all purposes as though they were set out word-for-word in this document along with amendments to this Agreement that may be executed from time to time.

(1) CONTRACTOR's Proposal is attached to this Agreement as [Exhibit A](#).

(2) Modifications to CONTRACTOR's Proposal, as specified in [Section 4.03](#) of this Agreement, are attached to this Agreement as [Exhibit B](#).

(3) The "Schedule of Value-Added Services" is attached to this Agreement as [Exhibit C](#).

(4) The RFP is attached to this Agreement as [Exhibit D](#).

Section 4.03 Agreement elements.

(a) Agreement documentation.

The agreement between the Parties will consist of this Agreement, the RFP, CONTRACTOR's Proposal and the following clarifications and modifications to the Proposal:

(1) Letters from Sherry Matthews to Jason Cooke, dated October 20, 1999, and October 25, 1999; and

(2) Letters from Jason Cooke to Sherry Matthews, dated October 19, 1999, and October 25, 1999.

(b) Order of documents.

In the event of any conflict or contradiction between or among these documents, the documents shall control in the following order of precedence:

(1) The final executed Agreement;

(2) All modifications and clarifications to CONTRACTOR's Proposal;

(3) CONTRACTOR's Proposal ;

(4) The "Schedule of Value-Added Services;" and

(5) The RFP.

(c) *Oral and written representations.*

No oral and written representations of the CONTRACTOR, including representations made outside of its formal Proposal documentation, have been regarded by HHSC as inducements to contract and are not expressly made a part of this Agreement.

Section 4.04 Notices.

(a) Any notice under this Agreement must be sent by registered or certified mail, return receipt requested, or shall be delivered in hand, and a receipt provided.

(b) Any notice under this Agreement to HHSC will be sufficient if hand delivered or mailed to:

Don A. Gilbert, M.B.A.
Commissioner
Health and Human Services Commission
P.O. Box 12347
4900 North Lamar Blvd.
Austin, Texas 78751

Copy to:
Office of General Counsel
Health & Human Services Commission
P.O. Box 12347
4900 North Lamar Blvd.
Austin, Texas 78751

(c) Any notice under this Agreement to CONTRACTOR will be sufficient if hand-delivered or mailed to:

Sherry Matthews
President & CEO
Sherry Matthews Incorporated
101 San Jacinto Boulevard
Austin, Texas 78701

Copy to:
CHIP Project Manager
Sherry Matthews Incorporated
101 San Jacinto Boulevard
Austin, Texas 78701

(d) Either Party may change its designee or address upon five (5) days' written notice to the other Party.

Section 4.05 Funding.

(a) This Agreement is expressly conditioned on the availability of state and federal appropriated funds. CONTRACTOR will have no right of action against HHSC in the event that HHSC is unable to perform its obligations under this Agreement as a result of the suspension, termination, withdrawal, or failure of funding to HHSC or lack of sufficient funding of HHSC for any activities or functions contained within the scope of this Agreement.

(b) If funds become unavailable, the provisions of [Section 14.06](#) (regarding Termination) will apply. HHSC will use all reasonable efforts to ensure such funds are available and will negotiate in good faith with CONTRACTOR to resolve any CONTRACTOR claims for payment that represent accepted Services or Deliverables and are pending at the time funds become unavailable.

Section 4.06 Delegation of authority.

Whenever, by any provision of this Agreement, any right, power, or duty is imposed or conferred on HHSC, the right, power, or duty so imposed or conferred is possessed and exercised by the Commissioner unless any such right, power, or duty is specifically delegated to the duly appointed agents or employees of HHSC. The Commissioner will reduce any such delegation of authority to writing and a copy of such delegation of authority furnished to CONTRACTOR on request.

Section 4.07 No waiver of sovereign immunity.

The Parties expressly agree that no provision of this Agreement is in any way intended to constitute a waiver by HHSC or the State of Texas of any immunities from suit or from liability that HHSC or the State of Texas may have by operation of law.

Section 4.08 Force majeure.

Neither CONTRACTOR nor HHSC will be liable to the other for any delay in, or failure of performance, of any requirement contained in the Agreement caused by a force majeure event. The existence of such causes of delay or failure will extend the period of performance in the exercise of reasonable diligence until after the causes of delay or failure have been removed. Each Party must inform the other in writing with proof of receipt within three (3) business days of the existence of a force majeure event or otherwise waive this right as a defense.

Section 4.09 Hold harmless.

The CONTRACTOR agrees that it shall hold harmless HHSC and its Commissioner, employees, agents, contractors, subcontractors, and independent consultants and their subcontractors and consultants from any and all actions in bid or proposal evaluation other than acts of willful misconduct and gross negligence.

Section 4.10 Evidence of financial solvency.

The CONTRACTOR must satisfactorily demonstrate the financial resources to absorb the risks associated with this Agreement at the request of HHSC.

Article 5. CONTRACTOR PERSONNEL MANAGEMENT

Section 5.01 Contractor Project Manager.

CONTRACTOR must appoint a full-time employee to serve as the primary CONTRACTOR contact under this Agreement (the “CONTRACTOR Project Manager”) subject to the HHSC’s prior approval of the selected individual. The initial CONTRACTOR Project Manager is specified in CONTRACTOR’s Proposal. The CONTRACTOR Project Manager will be located permanently at a site agreed upon by HHSC and CONTRACTOR and may not be replaced or reassigned by CONTRACTOR without the prior approval of HHSC.

Section 5.02 Qualifications, retention and replacement of CONTRACTOR employees.

CONTRACTOR agrees to assign an adequate number of personnel to perform the Services. The personnel CONTRACTOR assigns to perform the Services will be properly trained and fully qualified for the Services they are to perform. Notwithstanding transfer or turnover of personnel, CONTRACTOR remains obligated to perform the Services without degradation and in accordance with this Agreement.

Section 5.03 Key CONTRACTOR Personnel.

(a) CONTRACTOR’s Proposal includes a list of designated Key CONTRACTOR Personnel (“Key CONTRACTOR Personnel”). HHSC may from time to time, after consultation and agreement with CONTRACTOR, designate additional Key CONTRACTOR Personnel.

(b) The CONTRACTOR employees initially assigned to Key CONTRACTOR Personnel positions are as listed in CONTRACTOR’s Proposal. CONTRACTOR employees assigned to Key CONTRACTOR Personnel positions must be assigned to performance of the Services on a full-time basis unless otherwise accepted in CONTRACTOR’s Proposal or agreed to in advance by the HHSC Project Manager.

(c) Before assigning an individual to a Key CONTRACTOR Personnel position, whether as an initial or subsequent assignment, CONTRACTOR will notify HHSC of the proposed assignment, introduce the individual to appropriate HHSC representatives, and provide HHSC with a résumé and other information about the individual as reasonably requested by HHSC.

(d) If HHSC objects to the proposed assignment, HHSC and CONTRACTOR will attempt to resolve HHSC’s concerns on a mutually agreeable basis. If HHSC and CONTRACTOR are unable

to resolve HHSC's concerns within five (5) business days, CONTRACTOR may not assign the individual to that position and must propose to HHSC the assignment of another individual of suitable ability and qualifications.

(e) The CONTRACTOR employees filling Key CONTRACTOR Personnel positions may not be replaced or reassigned by CONTRACTOR without the prior approval of HHSC.

Section 5.04 *Conduct of Contractor personnel.*

(a) While performing the Services or otherwise fulfilling a duty or obligation under this Agreement, whether on CONTRACTOR's premises or on the premises of HHSC or any Texas state administrative agency, CONTRACTOR's personnel and subcontractors must

(i) Comply with HHSC's reasonable requests, rules and regulations regarding personal and professional conduct generally applicable to HHSC or state employees; and

(ii) Otherwise conduct themselves in a businesslike and professional manner.

(b) If HHSC determines in good faith that a particular employee or subcontractor is not conducting himself or herself in accordance with this Section 5.04, HHSC may provide CONTRACTOR with notice and documentation regarding such conduct. Upon receipt of such notice, CONTRACTOR must promptly investigate the matter and take appropriate action, which must include:

(1) Removing the employee from HHSC's account;

(2) Providing HHSC with notice of such removal; and

(3) Replacing the employee with a similarly qualified individual who is acceptable to HHSC.

Section 5.05 *Responsibility for Contractor personnel.*

(a) CONTRACTOR's employees will not in any sense be considered employees of HHSC or the State of Texas, but will be considered CONTRACTOR's employees for all purposes.

(b) Except as expressly provided in this Agreement, neither CONTRACTOR nor any of CONTRACTOR's employees, subcontractors or agents may act in any sense as agents or representatives of HHSC or the State of Texas.

(c) CONTRACTOR's employees must be paid exclusively by CONTRACTOR for all services performed. CONTRACTOR is responsible for and must comply with all requirements and obligations related to such employees under local, state or federal law, including minimum wage,

social security, unemployment insurance, state and federal income tax and workers' compensation obligations.

Section 5.06 *Cooperation with HHSC or state administrative agencies.*

(a) Cooperation with HHSC contractors.

CONTRACTOR agrees to reasonably cooperate with and work with the state's contractors, subcontractors and third party representatives as requested by HHSC.

(b) Cooperation with state and federal administrative agencies.

CONTRACTOR must ensure that CONTRACTOR personnel will cooperate with HHSC or other state or federal administrative agency personnel at no charge to HHSC for purposes relating to the administration of the CHIP program including, but not limited to the following purposes:

- (1) The investigation and prosecution of fraud, abuse, and waste in the Texas Title XIX Medical Assistance (Medicaid) Program or the CHIP program;
- (2) Audit, inspection, or other investigative purposes; and
- (3) Testimony in judicial or quasi-judicial proceedings relating to the Services under this Agreement or other delivery of information to HHSC or other agencies' investigators or legal staff.

Article 6. GOVERNING LAW AND REGULATIONS

Section 6.01 *Governing law and venue.*

This Agreement is governed by the laws of the State of Texas and interpreted in accordance with Texas law. Proper venue for litigation arising from this Agreement is the District Courts of Travis County, Texas.

Section 6.02 *Law and regulations governing administration of the Agreement.*

The administration of the Agreement shall be in accordance with the following laws and regulations:

- (1) Title XXI of the Social Security Act, as amended, and any final regulations promulgated thereunder;
- (2) [Chapter 62](#), Texas Health & Safety Code, as amended, and any administrative rules adopted under that chapter;

- (4) [Chapter 531](#), Texas Government Code, as amended; and
- (5) Any other pertinent provisions of Federal law or Texas law.

Section 6.03 *Contractor responsibility for compliance with laws and regulations.*

CONTRACTOR is responsible for compliance with all laws, regulations, and administrative rules that govern the performance of the Services including, but not limited to, all state and federal tax laws, state and federal employment laws, state and federal regulatory requirements, and licensing provisions. CONTRACTOR is responsible for ensuring each of its personnel who provide services under the Agreement are properly licensed, certified, and/or have proper permits to perform any activity related to the Services.

Section 6.04 *Laws and regulations governing procurement of the Services.*

(a) It is the express intention of the Parties that this Agreement be a procurement of media and marketing services and meeting all applicable requirements of the following:

- (1) Title 42, Code of Federal Regulations, Part 92;
- (2) Title 45, Code of Federal Regulations, Part 74;
- (3) [Chapter 62](#), Texas Health & Safety Code;
- (4) [Section 2155.144](#), Texas Government Code.

Section 6.05 *Immigration Reform and Control Act of 1986.*

CONTRACTOR shall comply with the requirements of the Immigration Reform and Control Act of 1986 and the Immigration Act of 1990, 8 U.S.C. §§ 1101, *et seq.*, regarding employment verification and retention of verification forms for any individual(s) hired on or after November 6, 1986, who will perform any labor or services under this Agreement.

Section 6.06 *Compliance with state and federal anti-discrimination laws.*

(a) To the extent such provisions are applicable to CONTRACTOR, CONTRACTOR agrees to fully comply with the following laws and regulations that implement such laws:

- (1) Title VI of the Civil Rights Act of 1964, 28 U.S.C. §§ 2000d to 2000d-4 (P.L. 88-352);
- (2) Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (P.L.] 93-112);

(3) The Americans with Disabilities Act of 1990, 29 U.S.C. § 706, 42 U.S.C. §§ 12101, *et seq.*;

(4) 47 U.S.C. §§ 152, 221, 225, 611 (P.L. 101-336);

(5) Title 45, Code of Federal Regulations, Part 80 (relating to race, color and national origin);

(6) Title 45, Code of Federal Regulations, Part 84 (relating to handicap);

(7) Title 45, Code of Federal Regulations, Part 86 (relating to sex); and

(8) Title 45, Code of Federal Regulations, Part 91 (relating to age).

Collectively, these authorities obligate HHSC to provide services without discrimination on the basis of race, color, national origin, age, sex, disability, or political or religious beliefs. CONTRACTOR agrees that in carrying out the terms of this Agreement, it will do so in a manner that assists HHSC to comply with such obligations. CONTRACTOR will use its best efforts to make available employment opportunities for qualified individuals with disabilities.

(b) CONTRACTOR agrees to comply with the applicable requirements of Texas Labor Code, [Chapter 21](#), which requires that certain employers not discriminate on the basis of race, color, disability, religion, sex, national origin, or age.

Section 6.07 *Environmental protection laws.*

CONTRACTOR agrees to comply with the applicable provisions of federal environmental protection laws as described in this Section:

(a) *Pro-Children Act of 1994.*

CONTRACTOR agrees to comply with the Pro-Children Act of 1994, as applicable, 20 U.S.C. §§ 6081 - 6084 P.L. 103-227; 108 Stat. § 104) regarding the provision of a smoke-free workplace and promoting the non-use of all tobacco products.

(b) *National Environmental Policy Act of 1969.*

CONTRACTOR agrees to comply with any applicable provisions relating to the institution of environmental quality control measures contained in the National Environmental Policy Act of 1969, 42 U.S.C. §§4321–4332,) and Executive Order 11514 (“Protection and Enhancement of Environmental Quality”).

(c) *Clean Air Act and Water Pollution Control Act regulations.*

CONTRACTOR agrees to comply with any applicable provisions relating to required notification of facilities violating the requirements of Executive Order 11738 (“Providing for Administration of the Clean Air Act and the Federal Water Pollution Control Act with Respect to Federal Contracts, Grants, or Loans”).

(d) *State Clean Air Implementation Plan.*

CONTRACTOR agrees to comply with any applicable provisions requiring conformity of federal actions to State (Clean Air) Implementation Plans under §176(c) of the Clean Air Act of 1955, as amended (42 U.S.C. §§740-7642).

(e) *Safe Drinking Water Act of 1974.*

CONTRACTOR agrees to comply with applicable provisions relating to the protection of underground sources of drinking water under the Safe Drinking Water Act of 1974, as amended (21 U.S.C. § 349; 42 U.S.C. §§ 300f to 300j-9).

Article 7. SERVICE LEVELS AND PERFORMANCE MEASUREMENT.

Section 7.01 *Performance measurement.*

Satisfactory performance of this Agreement will be measured in part by:

(a) Adherence to this Agreement, including all representations and warranties;

(b) Compliance with project work plans, schedules, and milestones as proposed by CONTRACTOR in the Technical Proposal contained in its Proposal and as revised by CONTRACTOR and finally approved by HHSC;

(c) Delivery of the Services and Deliverables in accordance with the service levels and availability proposed in its Proposal and as finally approved or accepted by HHSC;

(c) Results of audits performed by HHSC or its representatives in accordance with Article 9;

(d) Timeliness, completeness, and accuracy of required reports; and

(e) Achievement of Service performance measures developed by CONTRACTOR and HHSC and as modified from time to time by written agreement during the Initial Term of this Agreement.

Section 7.02 *Measurement and monitoring tools.*

CONTRACTOR must implement all reasonably necessary measurement and monitoring tools and procedures required to measure and report CONTRACTOR's performance of the Services against the applicable service levels. Such measurement and monitoring must permit reporting at a level of detail sufficient to verify compliance with the service levels, and will be subject to audit by HHSC. CONTRACTOR will provide HHSC with information and access to all information or work product produced by such tools and procedures upon request for purposes of verification.

Section 7.03 *Continuous improvement and best practices.*

CONTRACTOR must on an ongoing basis, as part of its total quality management process, identify ways to improve performance of the Services and identify and apply techniques and tools from other installations within its operations that would benefit the State either operationally or financially.

Article 8. AMENDMENTS, MODIFICATIONS, AND CHANGE ORDERS

Section 8.01 *Modifications.*

(a) Modifications resulting from changes in law or contract.

If Federal or State laws, rules, regulations, policies or guidelines are adopted, promulgated, judicially interpreted or changed, or if contracts are entered or changed, the effect of which is to alter the ability of either Party to fulfill its obligations under this Agreement, the Parties will promptly negotiate in good faith appropriate modifications or alterations to the Agreement and any Schedule(s) or Attachment(s) made a part of this Agreement. Such modifications or alterations must equitably adjust the terms and conditions of this Agreement and must be limited to those provisions of this Agreement affected by the change.

(b) Modifications resulting from imposition of remedies.

This Agreement may be modified under the terms of the Article 14 (relating to Remedies and Disputes). This Agreement may not be amended or modified unless such amendment or modification is in writing and signed by individuals with authority to bind the parties.

(c) Modifications upon renewal or extension of Agreement.

(1) If HHSC seeks modifications to the Agreement as a condition of any annual extension, HHSC's notice to the CONTRACTOR will specify those modifications to the Scope of Work, the Agreement pricing terms, or other terms and conditions of the Agreement HHSC seeks.

(2) Modifications proposed by HHSC may apply to the services under this Agreement in any Agreement year beginning after the date of notice to CONTRACTOR.

CONTRACTOR must respond to HHSC's proposed modification within 30 days of receipt. Upon receipt of CONTRACTOR's response to the proposed modifications, HHSC may enter into negotiations with CONTRACTOR to arrive at mutually agreeable Agreement amendments. In the event that HHSC determines that the Parties will be unable to reach agreement on mutually satisfactory Agreement modifications, then HHSC must provide written notice to CONTRACTOR of its intent not to extend the Agreement beyond the Agreement term then in effect, at least 90 days before the Agreement expiration date, inclusive of all extension options previously exercised.

Section 8.02 Change Order procedures.

(a) Expectations and understandings.

As specified in Section 8.01 of this Agreement, the Agreement may be amended by HHSC and CONTRACTOR by mutual agreement. Changes in contracted Services or Deliverables shall be authorized in accordance with this Article 8.

(b) Change order approval procedure.

(1) During the Initial Term of this Agreement HHSC or CONTRACTOR may propose changes in the Services, Deliverables, or other aspects of this Contract ("Changes") and any such Changes will be implemented pursuant to the procedures set forth in this Section 8.02.

(2) If HHSC desires to propose a Change, it shall deliver a written notice to the CONTRACTOR Project Manager describing the proposed Change ("Change Order Request"). The CONTRACTOR must respond to such proposal as promptly as reasonably possible by preparing, at no additional cost to HHSC, and delivering to the HHSC Project Manager a written document (a "Change Order Response"), that specifies:

(A) The effect, if any, of the Change Order Request on the amounts payable by HHSC under this Contract and the manner in which such effect was calculated;

(B) The effect, if any, of the Change Order Request on CONTRACTOR's performance of its obligations under this Agreement, including the effect on the Services or Deliverables;

(C) The anticipated time schedule for implementing the Change Order Request; and

(D) Any other information requested in the Change Order Request or which is reasonably necessary for HHSC to make an informed decision regarding the proposal.

(3) If HHSC accepts the Change Order Response, CONTRACTOR must indemnify and hold harmless HHSC from and against any losses, costs or expenses resulting from any inaccurate or incomplete information contained in the Change Order Response. A Change Order Response constitutes an irrevocable Proposal by CONTRACTOR to implement the proposal described therein on the terms set forth in the Change Order Response.

(4) If CONTRACTOR desires to propose a Change, it must deliver a CONTRACTOR Change Order Request to HHSC that includes the information described in Section 8.02(b) for a Change Order and Change Order Response.

(c) *Written approval required.*

No Change to the contracted Services or Deliverables or any other aspect of this Agreement will become effective without the written approval of the HHSC Project Manager. If HHSC accepts CONTRACTOR's proposal set forth in the Change Order Response or the CONTRACTOR Change Order Request, any such Change will thereafter be deemed part of the Services and this Contract will be deemed amended accordingly and in compliance with Section 8.01 or Section 8.03 of this Agreement. Under no circumstances will CONTRACTOR be entitled to payment for any work or services rendered under a Change Order that has not been approved by HHSC in accordance with the Change Order Procedures.

Section 8.03 *Required compliance with modification procedures.*

No different or additional services, work, or products will be authorized or performed except pursuant to an amendment or modification of this Agreement that is executed in compliance with this Article. No waiver of any term, covenant, or condition of this Agreement will be valid unless executed in compliance with this Article 8. CONTRACTOR will not be entitled to payment for any services, work or products that are not authorized by a properly executed Agreement amendment or modification, or through the express authorization of HHSC.

Article 9. AUDIT AND FINANCIAL COMPLIANCE.

Section 9.01 *Financial record retention and audit.*

CONTRACTOR agrees to maintain and retain supporting financial information and documents which are adequate to ensure that claims for contract funds are made in accordance with applicable Federal and State requirements to ensure the accuracy and validity of CONTRACTOR invoices. Such documents shall be maintained and retained by CONTRACTOR for a period of three (3) years and ninety (90) days after the date of submission of the final billing or until the resolution of all audit questions, whichever is longer. CONTRACTOR agrees to repay any valid, undisputed audit exceptions taken by HHSC in any audit of this contract.

Section 9.02 *Operation/performance audits.*

CONTRACTOR agrees to make available at reasonable times and for reasonable periods all books, records, and supporting documents kept current by CONTRACTOR pertaining to this Agreement, wherever such books, records, and supporting documentation are maintained, for purposes of inspecting, monitoring, auditing, or evaluation by HHSC, the State Auditor of Texas, the Comptroller General of the United States, the United States Department of Health and Human Services, a State or Federal law enforcement agency, or their representatives upon request or notification from HHSC.

Section 9.03 *Access to records, books, and documents.*

(a) CONTRACTOR must provide the officials and entities identified in paragraph (b) of this Section 9.03 with prompt, reasonable, and adequate access to any records, books, documents, and papers that are directly pertinent to the performance of the services under this Agreement. Such access must be provided upon request of the officials or entities identified in paragraph (b) for the purpose of examination, audit, investigation, contract administration, or the making of excerpts or transcripts.

(b) The access required under this Section 9.03 must be provided to the following officials and/or entities:

- (1) The United States Department of Health and Human Services or its designee;
- (2) The Comptroller General of the United States or its designee;
- (3) CHIP program personnel from HHSC or the Texas Department of Health;
- (4) The Office of Investigations and Enforcement of HHSC;
- (5) The CHIP program Management Services Contractor, when acting on behalf of HHSC;
- (6) The Office of the State Auditor of Texas or its designee; and
- (7) A special or general investigating committee of the Texas Legislature or its designee.

Article 10. TERMS AND CONDITIONS OF PAYMENT.

Section 10.01 *Fixed price contract.*

(a) Except as specified in paragraph (d) of this Section 10.01 (relating to Value Added Services), CONTRACTOR agrees to provide the Services and deliverables described in Article 7 of this contract for a fixed price not to exceed **\$2,000,000.00** during the Initial Term.

(1) In no event shall the total costs of this agreement during the Initial Term and any extensions thereof exceed without amendment or a properly executed Change Order, the sum of **\$2,000,000.00**.

(b) CONTRACTOR understands and expressly assumes all risks associated with the commitment of delivery of the Services and Deliverables, including the failure, termination or suspension of funding to HHSC, delays or denials of required approvals, and cost overruns not reasonably attributable to HHSC. To the extent funding or required approvals are not provided, CONTRACTOR will not be further obligated to provide Services or Deliverables beyond any Service or Deliverable that HHSC is unable to provide acceptable assurances of available funding.

(c) CONTRACTOR further agrees that

(1) Except as provided in paragraph (d) of this Section 10.01, the fee for the Services and Deliverables referenced in this Section 10.01 represents the total cost to HHSC and the State of Texas for the contracted Services and Deliverables;

(2) No other charges for tasks, functions, or activities that are incidental or ancillary to the delivery of the Services and Deliverables will be sought from HHSC or any other state agency, nor will the failure of HHSC or any other party to pay for such incidental or ancillary services entitle CONTRACTOR to withhold Services or Deliverables due under the Agreement; and

(3) CONTRACTOR will not be entitled to payment for any Service or Deliverable unless and until it has been performed or delivered to HHSC and that no partial or progress payments will be made except as mutually agreed upon by the Parties.

(d) CONTRACTOR further agrees that charges and fees for value-added services will be submitted via invoice to HHSC in accordance with the financial limits and procedures described in the "Schedule of Value-Added Services" attached to this Agreement as [Exhibit C](#).

Section 10.02 Retainage.

(a) HHSC may, in its discretion, withhold a portion of payment for a Service or Deliverable in an amount not to exceed ten percent (10%) of the cost for the Service or Deliverable as retainage.

(b) Any funds withheld as retainage must be released upon HHSC's approval and acceptance of the final Service or Deliverable due under this Agreement.

Section 10.03 Invoices.

(a) CONTRACTOR will be paid in accordance with the schedule provided in its Proposal. CONTRACTOR will submit an invoice for Service and/or Deliverables to the HHSC Project Manager, the HHSC Accounting department, and the CHIP Management Services contractor (if any) in accordance with the payment schedule. HHSC will notify CONTRACTOR of addresses and addressees following execution of this Agreement.

(b) Upon HHSC's request, the CONTRACTOR will provide invoices to the degree of detail necessary to resolve any review, examination, inquiry, or audit HHSC or any other responsible authority.

(c) Invoices for optional services and components must be submitted after such services or components are performed or delivered or in accordance with a payment schedule developed by mutual agreement between the Parties.

Section 10.04 *Time and manner of payment.*

Payments for Services and Deliverables under the Agreement will be made in accordance with the Texas Prompt Payment Act, Chapter 2251, Government Code. In the event HHSC disputes payment of an invoice for purposes of enforcing a remedy or obtaining set-off against payments due, HHSC may limit payments in accordance with Article 14 of this Agreement.

Section 10.05 *Rights of set-off.*

(a) General right of set-off.

With respect to any undisputed amount which a Party in good faith determines should be reimbursed to it or is otherwise payable to it by the other Party pursuant to this Agreement, the Party seeking the set-off may deduct the entire amount owed against the charges otherwise payable or expenses owed to it under this Agreement until such time as the entire amount determined to be owed has been paid.

(b) Duty to make payments.

HHSC will be relieved of its obligation to make any payments to the CONTRACTOR until such time as all such amounts have been credited to HHSC and the CONTRACTOR will be relieved of its obligation to make any payments to HHSC until such time as such amounts have been credited to the CONTRACTOR.

Section 10.06 *Expenses.*

Except as provided in its cost Proposal, all other expenses (including travel and travel-related expenses) incurred by the CONTRACTOR in connection with its provision of the Services or Deliverables will not be reimbursed by HHSC unless agreed upon by HHSC.

Section 10.07 Disputed fees.

If HHSC disputes payment of all or any portion of an invoice from the CONTRACTOR, HHSC will notify the CONTRACTOR of such dispute and both Parties will attempt in good faith to resolve the dispute. HHSC shall not be required to pay any disputed portion of a CONTRACTOR invoice. Notwithstanding any such dispute, the CONTRACTOR must continue to perform the Services and produce Deliverables in compliance with the terms of this Agreement pending resolution of such dispute so long as all undisputed amounts continue to be paid to CONTRACTOR.

Section 10.08 Project budget.

(a) CONTRACTOR agrees to prepare and submit a budget (the "Project Budget") for approval by HHSC and subject to the terms requested by HHSC.

(b) The Project Budget must at a minimum detail CONTRACTOR's estimated expenditures for the performance of the Services, within the financial limits prescribed in the Article 10, and must include an allocation of costs for the contracted Services.

(c) CONTRACTOR agrees that the payment of any fees or costs under this Agreement is conditioned upon the delivery and approval of a Project Budget under this Section 10.07.

Section 10.09 Restriction on assignment of fees.

During the term of the Agreement CONTRACTOR may not, directly or indirectly, assign to any third party any beneficial or legal interest of CONTRACTOR in or to any payments to be made by HHSC pursuant to this Agreement.

Section 10.10 Liability for taxes.

HHSC is not responsible in any way for the payment of any Federal, state or local taxes related to or incurred in connection with the Services or Deliverables or this Agreement. CONTRACTOR must pay and discharge any and all such taxes, including any penalties and interest.

Section 10.11 Liability for employment-related charges and benefits.

CONTRACTOR will perform work under this Agreement as an independent contractor and not as agent or representative of HHSC. CONTRACTOR is solely and exclusively liable for all taxes and employment-related charges incurred in connection with the performance of this Agreement. HHSC will not be liable for any employment-related charges or benefits of CONTRACTOR, such as workers compensation benefits, unemployment insurance and benefits, or fringe benefits.

Section 10.12 Liability for overtime compensation.

CONTRACTOR will be solely responsible for any obligations of overtime pay due employees.

Article 11. DISCLOSURE AND CONFIDENTIALITY OF INFORMATION.

Section 11.01 Confidentiality.

(a) CONTRACTOR and all subcontractors under this Contact shall treat all information which is obtained through performance under this Agreement as confidential information to the extent that confidential treatment is provided under law and regulations, and shall not use any information so obtained in any manner except as necessary to the proper discharge of obligations and securing of rights hereunder.

(b) CONTRACTOR will have a system in effect to protect all records and all other documents deemed confidential by law which are maintained in connection with the activities funded under this Agreement. Any disclosure or transfer of confidential information by CONTRACTOR, including information required by HHSC, will be in accordance with applicable law.

Section 11.02 Requests for public information.

(a) HHSC agrees that it will promptly notify the CONTRACTOR of a request for disclosure of public information that relates to information or data to which CONTRACTOR has a proprietary or commercial interest. HHSC agrees to deliver a copy of the request for public information to the CONTRACTOR.

(b) With respect to any confidential information which is the subject of a request for disclosure, the CONTRACTOR is required to provide a written explanation of specific reasons why the requested information is confidential or otherwise excepted from required public disclosure under law. HHSC shall, in its sole discretion, determine the appropriate response to the request for information.

Section 11.03 Publicity.

(a) Except as provided in paragraph (b) below, CONTRACTOR shall not use the name of HHSC, the State of Texas, or any other state agency, or refer to HHSC or any such agency directly or indirectly in any media release, public announcement, or public disclosure relating to the, this Agreement or its subject matter, including, but not limited to, in any promotional or marketing materials, customer lists, or business presentations (other than proposals submitted to the State of Texas, an administrative agency of the State of Texas, or a governmental agency of another state).

(b) CONTRACTOR may publish, at its sole expense, results of CONTRACTOR performance under this Agreement with HHSC's prior review and approval, which HHSC may exercise at its sole discretion. Any publication (written, visual, or sound) shall acknowledge the support received from HHSC and any federal agency, as appropriate. CONTRACTOR shall provide HHSC at least

three (3) copies of any such publication prior to public release. CONTRACTOR shall provide additional copies at the request of HHSC.

Article 12. SUBCONTRACTING AND THIRD PARTY RELATIONSHIPS

Section 12.01 *General limitations on the employment of subcontractors.*

Except as and to the extent HHSC may agree otherwise in writing, CONTRACTOR shall not subcontract its obligations under this Agreement, other than those subcontractors identified in CONTRACTOR's Proposal and approved by HHSC, except as provided in this Article 12.

Section 12.02 *Prior notification of intention to subcontract the Services.*

Subject to Section 12.04 below, prior to entering into a subcontract with a third party and following notice to HHSC of CONTRACTOR's intent to enter into such a subcontract, HHSC may require CONTRACTOR to:

(a) Specify the components of the Services affected, the scope and amount of the proposed subcontract between CONTRACTOR and such third party, and the identity and qualifications of such third party;

(b) Include in the subcontract between CONTRACTOR and such third party such provisions of this Agreement as HHSC reasonably deems necessary and appropriate under the circumstances as flowdown provisions;

(c) Include in the subcontract between CONTRACTOR and such third party the right for CONTRACTOR to terminate such subcontract upon HHSC's request under the following circumstances:

(1) In the event of materially deficient performance on the part of such third party;

(2) Where HHSC has good faith doubts concerning such third party's ability to render future performance because of changes in ownership, management, financial condition, or otherwise; or

(3) Where there have been material misrepresentations by or concerning such third party.

Section 12.03 *Subcontracts for routine, ordinary, and non-material services.*

(a) CONTRACTOR may, in the ordinary course of business, subcontract for third party services or products that:

- (1) Are not dedicated to HHSC;
- (2) Are not material to a particular function constituting a part of the Services;
- (3) Do not result in a material change in the way CONTRACTOR conducts its business; and
- (4) Do not adversely affect HHSC or the State of Texas, whether in performance of or charges for the Services or otherwise.

(b) If HHSC expresses concerns to CONTRACTOR about such subcontract, CONTRACTOR must discuss such concerns with HHSC and work in good faith to resolve HHSC's concerns on a mutually acceptable basis.

Section 12.04 *Emergencies.*

(a) Where a bona fide emergency that materially affects the Services or when circumstances otherwise warrant immediate action by CONTRACTOR to subcontract with third parties, CONTRACTOR may, after using its best efforts to comply with the notice requirement set forth in Section 12.02, enter into subcontracts with such third parties without prior notice to HHSC of CONTRACTOR's intent to enter into such a subcontract.

(b) The scope and duration of subcontract entered into by CONTRACTOR under this Section 12.04 must be narrowly tailored to address the emergency or the circumstances warranting such action. CONTRACTOR must otherwise use its best efforts to comply with Section 12.01 and Section 12.02 and upon request by HHSC, shall provide the information described in Section 12.02.

Section 12.05 *Approved subcontractors.*

Subject to the other provisions of this Article 12, HHSC expressly consents to CONTRACTOR's use of the subcontractors designated in its Proposal for the provision of the Services specified in CONTRACTOR's Proposal (the "Approved Subcontractors").

Section 12.06 *Responsibility for subcontractors.*

(a) CONTRACTOR will remain fully responsible for obligations, services and functions performed by its subcontractors to the same extent as if such obligations, services and functions were performed by CONTRACTOR employees and for purposes of this Agreement such work shall be deemed work performed by CONTRACTOR.

(b) CONTRACTOR shall be HHSC's sole point of contact regarding the Services, including with respect to payment. HHSC may require that a subcontractor and CONTRACTOR execute an agreement that designates CONTRACTOR as the subcontractor's payment agent with respect to HHSC.

(c) CONTRACTOR must not disclose Confidential Information of HHSC or the State of Texas to a subcontractor unless and until such subcontractor has agreed in writing to protect the confidentiality of such Confidential Information in the manner required of CONTRACTOR under this Agreement.

(d) CONTRACTOR must identify any subcontractor that is a newly-formed subsidiary or entity, whether or not an affiliate of CONTRACTOR, substantiate the proposed subcontractor's ability to perform the subcontracted Services, and certify to HHSC that no loss of Service will occur as a result of the performance of such subcontractor.

Section 12.07 *Retention of critical third party providers.*

Subject to Section 12.01 through Section 12.06 above, CONTRACTOR must continue to use existing third party providers of services who are believed by HHSC to have knowledge, either technical or business, not easily replaceable and critical to CONTRACTOR in providing the Services to the State. Such third party providers, if any, will be identified by HHSC at least 90 days prior to expiration of the Initial Term of this Agreement. Upon making a determination that continued use of any third party provider is not in the best interests of the State, subject to prior written consent by HHSC, CONTRACTOR may eliminate such provider or diminish such provider's level of effort.

Section 12.08 *Replacement of subcontractors.*

Upon reasonable notice to CONTRACTOR, HHSC may require CONTRACTOR to replace any subcontractor without penalty to HHSC. The replacement may be directed for subcontractor non-performance or substantial substandard performance. CONTRACTOR will use best efforts to replace the subcontractor with a qualified substitute subcontractor with no or minimal disruption in the performance of the Services.

Section 12.09 *Availability of Approved Subcontractors following termination or expiration of Agreement.*

Upon expiration or termination of this Agreement for any reason, HHSC and/or the State will have the right to enter into direct agreements with any of the Approved Subcontractors. CONTRACTOR agrees that its arrangements with Approved Subcontractors will not prohibit or restrict such subcontractors from entering into direct agreements with HHSC and/or the State.

Article 13. PROPERTY RIGHTS.

Section 13.01 *Ownership of work product.*

Any Deliverable and any and all work products of CONTRACTOR that result from performance of the Services under this Agreement are the exclusive property of the State of Texas. CONTRACTOR may, with the permission of HHSC and at its own expense, retain a sufficient number of copies of the work product as may be required to fulfill the terms and conditions of this Agreement and until such time as CONTRACTOR is released from further obligation by HHSC. Until such release, CONTRACTOR must treat all information and work products as proprietary and confidential and must neither release nor share any such information or work product with any person or entity without the written consent of HHSC. If the work products resulting from this Agreement contain information or data that is the intellectual property of CONTRACTOR or another party that is or could be protected by Federal copyright or patent laws or Texas trade secret laws, CONTRACTOR must grant or obtain a license in favor of HHSC and/or the Federal Government as provided in [Section 13.02](#) of this Agreement.

Section 13.02 *Copyrights, publications and patents.*

(a) CONTRACTOR understands and agrees that the activities supported by the Agreement are intended to produce original promotional materials for the exclusive use and benefit of the CHIP program.

(b) CONTRACTOR must notify HHSC of the extent, if any, to which such materials include previously-developed information, data, or concepts not intended for the primary benefit of the CHIP program and obtain HHSC's consent prior to using such previously-developed information, data, or concepts.

(c) CONTRACTOR may, with HHSC's consent, copyright such material subject to the royalty-free, nonexclusive, and irrevocable license in favor of the Federal Government and/or HHSC to reproduce, publish or otherwise use, and to authorize others to use for government purposes:

(1) The copyright in any work developed under a grant, subgrant, or Agreement under a grant or subgrant; and

(2) Any rights of copyright to which a grantee, subgrantee or a CONTRACTOR purchases ownership with grant support. Use of the copyright for government purposes includes the right to change the original material as necessary to use for governmental purposes.

Section 13.03 *Publicity.*

CONTRACTOR may publish at its expense the results of or other publicity regarding its performance under this Agreement with prior HHSC review and approval. HHSC may exercise the right of review and approval at its sole discretion. Any publication (written, visual, or sound) should include acknowledgment of the support received from HHSC and the appropriate Federal agency, if applicable. At least three copies of any such publication must be provided to HHSC. HHSC reserves the right to require additional copies before or after the initial review.

Article 14. REMEDIES AND DISPUTES.

Section 14.01 *Understanding and expectations.*

(a) The CONTRACTOR agrees and understands that HHSC may pursue contractual remedies for both programmatic and financial noncompliance. HHSC, in its discretion, may impose or pursue one or more remedies for each item of noncompliance and will determine sanctions on a case-by-case basis. HHSC's pursuit or non-pursuit of a tailored administrative remedy shall not constitute a waiver of any other remedy that HHSC may have at law or equity.

(b) As described in the Request for Proposals, the CHIP program represents a comprehensive and aggressive effort to provide adequate health care to uninsured children by providing affordable insurance to their families. Section 2 of this Agreement also describes HHSC's objective to establish a flexible and responsive relationship with CONTRACTOR. Accordingly, the remedies described in this Article 14 are directed to CONTRACTOR's timely and responsive performance of the Services and production of Deliverables.

Section 14.02 *Administrative remedies.*

(a) CONTRACTOR responsibility for improvement.

(1) HHSC expects CONTRACTOR's performance to continuously meet or exceed performance criteria over the term of this Agreement. Accordingly, CONTRACTOR will be responsible for ensuring that performance for a particular activity or result described in its Proposal or the RFP that falls below the expectations identified in CONTRACTOR's Proposal, the RFP, or this Agreement must improve within thirty (30) days of written notice from HHSC regarding the deficiency, in accordance with the procedures specified in subsection (b), (c), and (d) of this Section 14.02.

(2) In keeping with HHSC's approach to tailored remedies, HHSC will administer the remedies specified in this Article 14 in accordance with the following progression of remedies:

(A) Notification of deficiency and opportunity to cure a non-material deficiency in accordance with subsection (b) of this Section 14.02;

(B) Application of liquidated damages in accordance with [Section 14.03](#) of this Article 14 and, at HHSC's sole discretion, either separately or in conjunction with liquidated damages:

(i) A corrective action plan in accordance with subsection (c) of this Section 14.02;

(ii) A request for modification of this Agreement following assessment of liquidated damages in accordance with [Section 14.05](#) of this [Article 14](#);

(C) Assessment of additional remedies as specified in subsection (d) of this [Section 14.02](#); and

(D) Termination of this Agreement in accordance with [Section 14.09](#) of this [Article 14](#).

(3) The prioritization of remedies described in subsection (a)(2) of this [Section 14.02](#) will not limit:

(A) HHSC's right to terminate this agreement under [Section 14.08](#) or [Section 14.10](#) of this [Article 14](#);

(B) CONTRACTOR's right to terminate under [Section 14.11](#) of this [Article 14](#); or

(C) The Parties' ability to terminate this Agreement under [Section 14.07](#) of this [Article 14](#).

(b) Notification and interim response.

(1) HHSC will notify CONTRACTOR in writing of specific areas of CONTRACTOR performance that fail to meet performance expectations, standards, or schedules, but which, in the determination of HHSC, do not result in a material delay in the implementation or operation of the CHIP marketing/media campaign. CONTRACTOR will, within three (3) business days of receipt of written notice of a non-material deficiency, provide the HHSC Project Manager a written response that:

(A) Explains the reasons for the deficiency, CONTRACTOR's plan to address or cure the deficiency, and the date and time by which the deficiency will be cured; or

(B) If CONTRACTOR disagrees with HHSC's findings, its reasons for disagreeing with HHSC's findings.

(2) CONTRACTOR's proposed cure of a non-material deficiency is subject to the approval of HHSC. CONTRACTOR's repeated commission of non-material deficiencies or repeated failure to resolve any such deficiencies may be regarded by HHSC as a material deficiency and entitle HHSC to pursue any other remedy provided in this Agreement or any other appropriate remedy HHSC may have at law or equity.

(c) Corrective Action Plan.

(a) In the event HHSC assesses a liquidated damage as provided in this [Article 14](#), HHSC may require the CONTRACTOR to submit to HHSC a detailed written plan (the "[Corrective Action](#)")

Plan”) to correct or resolve the deficiency or event causing the assessment of the liquidated damage. The Corrective Action Plan must provide a detailed explanation of the reasons for the cited deficiency, the CONTRACTOR’s assessment or diagnosis of the cause, and a specific proposal to cure or resolve the deficiency. The Corrective Action Plan must be submitted within ten (10) business days following the request for the plan by HHSC and is subject to approval by HHSC, which approval will not unreasonably be withheld.

(b) Notwithstanding the submission and acceptance of a Corrective Action Plan, CONTRACTOR remains responsible for achieving all oral and written performance criteria. The acceptance of a Corrective Action Plan under this Section 14.02 will not excuse prior substandard performance, relieve CONTRACTOR of its duty to comply with performance standards, or prohibit HHSC from assessing additional liquidated damages or pursuing other appropriate remedies for continued substandard performance.

(d) *Additional remedies.*

HHSC at its own discretion may impose one or more the following remedies for each item of noncompliance and will determine the scope and severity of the remedy on a case-by-case basis. Both Parties agree that a state or federal statute, rule, regulation or federal guideline will prevail over the provisions of this Section 14.02 unless the statute, rule, regulation, or guidelines can be read together with this Section 14.02 to give effect to both.

(1) Assess liquidated damages in accordance with Section 14.03 and deduct such damages against payments to CONTRACTOR as set-off in accordance with Section 14.04;

(2) Conduct accelerated monitoring of the CONTRACTOR. Accelerated monitoring means more frequent or more extensive monitoring will be performed by HHSC than would routinely be accomplished;

(3) Require additional, more detailed, financial and/or programmatic reports to be submitted by CONTRACTOR in accordance with Article 9 of this Agreement; or

(4) Decline to renew this Agreement.

HHSC will formally notify CONTRACTOR of the imposition of an administrative remedy in writing in accordance with paragraph (b) of this Section 14.02, with the exception of accelerated monitoring, which may be unannounced. CONTRACTOR is required to file a written response to in accordance with paragraph (b) of this Section 14.02.

(e) *Informal review of administrative remedies.*

CONTRACTOR may request an informal review of the imposition of the foregoing remedies in accordance with Section 14.11 of this Article 14 within ten (10) business days of receipt of written notification of the imposition of a remedy by HHSC.

Section 14.03 *Liquidated damages.*

The liquidated damages prescribed in this Section 14.03 are not intended to be in the nature of a penalty, but are intended to be reasonable estimates of HHSC's projected financial loss and damage resulting from the CONTRACTOR's nonperformance, including financial loss as a result of project delays.

Accordingly, in the event CONTRACTOR fails to perform in accordance with this Agreement, HHSC may assess liquidated damages as provided in this Section 14.03.

(a) Failure to provide contracted services or support.

If CONTRACTOR fails to perform any of the Services described in the RFP, Section V, and in CONTRACTOR's Proposal in accordance with the schedule provided in CONTRACTOR's work plan, HHSC may assess a liquidated damage of \$250.00 each business day such Service is not provided.

(1) Maximum damages.

Liquidated damages assessed pursuant to this paragraph shall not, in any single month, exceed 25% of the fee due CONTRACTOR for that month. However, if CONTRACTOR fails to perform any Service or combination of Services, and such failure represents a budgeted sum greater than 25% of the fee due CONTRACTOR for that month, HHSC may terminate the Agreement in accordance with this Article 14.

(2) CONTRACTOR responsibility for associated costs.

If HHSC terminates this Agreement pursuant to Paragraph (a)(i) of this Section 14.03, CONTRACTOR will be responsible to HHSC for all costs incurred by HHSC, the State of Texas or any of its administrative agencies to replace the CONTRACTOR. These costs include, but are not limited to, the costs of procuring a substitute vendor following termination of this Agreement and the cost of any claim or litigation that is reasonably attributable to CONTRACTOR's failure to perform any Service in accordance with the RFP, CONTRACTOR's Proposal, and this Agreement.

Section 14.04 *Method of collection.*

HHSC may elect to assess a liquidated damage directly to CONTRACTOR, or it may deduct amounts assessed as liquidated damages as set-off against payments then due to CONTRACTOR for the Services or Deliverables or which become due at any time thereafter.

Section 14.05 *Modification of Agreement in the event of remedies.*

As provided in Section 8.01(b) of this Agreement, HHSC may propose a modification of this Agreement in response to the imposition of a remedy under this Article 14. Any modifications under this Section 14.05 must be reasonable, limited to the matters causing the exercise of a remedy, and in writing. CONTRACTOR must negotiate such proposed modifications in good faith.

Section 14.06 *Termination of Agreement.*

In addition to other provisions of Article 14 of this Agreement allowing termination, this Agreement will terminate upon full performance of all requirements contained in this Agreement, unless extended in accordance with Article 4 of this Agreement, or terminated sooner under the terms of Section 14.07 through Section 14.10 of this Agreement. Prior to completion of the Initial Term and any extensions or renewal thereof, all or a part of this Agreement may be terminated for any of the following reasons:

Section 14.07 *Termination by mutual agreement of the Parties.*

This Agreement may be terminated by mutual agreement of the Parties. Such agreement must be in writing.

Section 14.08 *Termination in the best interest of the State.*

This Agreement may be terminated by HHSC at any time when, in the sole determination of HHSC, termination is in the best interests of the State of Texas.

Section 14.09 *Termination for Cause.*

HHSC reserves the right to terminate this Agreement, in whole or in part, upon the following conditions:

(a) *Assignment for the benefit of creditors, appointment of receiver, or inability to pay debts.*

HHSC may terminate this Agreement if CONTRACTOR:

- (1) Makes an assignment for the benefit of its creditors;
- (2) Admits in writing its inability to pay its debts generally as they become due; or
- (3) Consents to the appointment of a receiver, trustee, or liquidator of the CONTRACTOR or of all or any part of its property.

(b) Judgment and execution.

(1) HHSC may terminate this Agreement if judgment for the payment of money in excess of \$50,000.00 (fifty thousand dollars and zero cents) which is not covered by insurance is rendered by any court or governmental body against CONTRACTOR, and CONTRACTOR does not

(i) Discharge the judgment or provide for its discharge in accordance with the terms of the judgment;

(ii) Procure a stay of execution thereof within 30 days from the date of entry thereof; or

(iii) Perfect an appeal of such judgment and cause the execution of such judgment to be stayed during the appeal, providing financial such reserves as may be required under generally accepted accounting principles.

(2) If a writ or warrant of attachment or any similar process is issued by any court against all or any material portion of the property of CONTRACTOR, and such writ or warrant of attachment or any similar process is not released or bonded within 30 days after its entry, HHSC may terminate this Agreement in accordance with this Section 14.06.

(c) Failure to adhere to laws, rules, ordinances, or orders.

HHSC may terminate this contract if a court of competent jurisdiction finds CONTRACTOR failed to adhere to any laws, ordinances, rules, regulations or orders of any public authority having jurisdiction and such violation prevents or substantially impairs performance of CONTRACTOR's duties under this Agreement.

(d) Breach of confidentiality.

HHSC may terminate this agreement if CONTRACTOR breaches a standard of confidentiality with respect to the Services provided under this Agreement.

(e) Failure to maintain adequate personnel or resources.

HHSC may terminate this Agreement if, after providing notice and an opportunity to correct in accordance with Section 14.02 of this Agreement, HHSC determines that the CONTRACTOR has either failed to provide the personnel and resources described in its Proposal or has failed to supply personnel or resources and such failure results in CONTRACTOR's inability to fulfill its duties under this Agreement and substantially compromises HHSC's ability to comply with legislative mandates regarding the implementation or administration of the CHIP program.

(f) *Termination for insolvency.*

(1) HHSC may, by giving written notice of termination to CONTRACTOR, terminate this Agreement as of a date specified in such notice of termination if CONTRACTOR:

(A) files for bankruptcy;

(B) becomes or is declared insolvent, or is the subject of any proceedings related to its liquidation, insolvency or the appointment of a receiver or similar officer for it;

(C) makes an assignment for the benefit of all or substantially all of its creditors; or

(D) enters into a contract for the composition, extension, or readjustment of substantially all of its obligations.

(2) CONTRACTOR agrees to pay for all reasonable expenses of HHSC including the cost of counsel, incident to:

(A) The enforcement of payment of all obligations of the CONTRACTOR by any action or participation in, or in connection with a case or proceeding under chapters 7, 11, or 13 of the United States Bankruptcy Code, or any successor statute;

(B) A case or proceeding involving a receiver or other similar officer duly appointed to handle the CONTRACTOR's business; or

(C) A case or proceeding in a State court initiated by HHSC when previous collection attempts have been unsuccessful.

(g) *Termination for gifts and gratuities.*

(1) HHSC may terminate this Agreement on one (1) days' notice to the CONTRACTOR following the determination by a competent judicial or quasi-judicial authority and CONTRACTOR's exhaustion of all legal remedies that the CONTRACTOR, its employees, agents or representatives have either offered or given any thing of value an officer or employee of HHSC or the State of Texas in violation of state law.

(2) CONTRACTOR must include a similar provision in each of its subcontracts and shall enforce this provision against a subcontractor who has offered or given any thing of value to any of the persons or entities described in this Section 14.09, whether or not the offer or gift was in the CONTRACTOR's behalf.

(3) Termination of a subcontract by CONTRACTOR pursuant to this provision will not be a cause for the assessment of a liquidated damage or termination of this Agreement unless:

(A) CONTRACTOR fails to replace such terminated subcontractor within a reasonable time; and

(B) Such failure constitutes cause as described in Paragraph (e) of this Section 14.09.

(4) For purposes of this section, a “thing of value” means any item of tangible or intangible property that has a monetary value of more than \$50.00 and includes, but is not limited to, cash, food, lodging, entertainment, and charitable contributions. The term does not include contributions to holders of public office or candidates for public office that are paid and reported in accordance with state and/or federal law.

Section 14.10 *Termination for non-appropriation of funds.*

(a) Notwithstanding any other provision of this Agreement, if funds for the continued fulfillment of this Agreement by HHSC are at any time not forthcoming or are insufficient, through failure of any entity to appropriate funds or otherwise, then HHSC will have the right to terminate this Agreement at no additional cost and with no penalty whatsoever by giving prior written notice documenting the lack of funding.

(b) In such instance, unless otherwise agreed to by the Parties, this Agreement will terminate and become null and void on the last day of the fiscal period for which appropriations were received. HHSC will use all reasonable efforts to ensure appropriated funds are available.

Section 14.11 *Termination in the event of HHSC's failure to pay.*

In the event that HHSC fails to pay CONTRACTOR undisputed charges when due under the Agreement and fails to make such payment within sixty (60) days of receipt of written notice from the CONTRACTOR of the failure to make such payment, the CONTRACTOR may, by giving written notice to the HHSC, terminate this Agreement as of a date specified in the notice of termination.

Section 14.12 *Notice of termination.*

Each Party will provide written notice of termination of this Agreement under Section 14.07, Section 14.08, Section 14.09, Section 14.10, or Section 14.11 of this Agreement at least 30 days prior to the intended date of termination unless an emergency exists.

Section 14.13 *Extension of termination effective date.*

HHSC may extend the effective date of termination one or more times as it elects, in its sole discretion, provided that the total of all such extensions shall not exceed 90 calendar days following the original effective date of termination.

Section 14.14 *Injunctive relief.*

Each Party acknowledges and agrees that, in the event of a breach or threatened breach of any of the provisions of this Agreement, such Party may have no adequate remedy in damages. Accordingly, each Party will be entitled to seek an injunction to prevent such breach or threatened breach. However, the specification of a particular legal or equitable remedy will not be construed as a waiver, prohibition, or limitation of any other legal or equitable remedies in the event of a breach of this Agreement.

Section 14.15 *Payment and other provisions at Agreement termination.*

(a) If HHSC terminates this Agreement, HHSC will pay CONTRACTOR on the effective date of termination (or as soon as possible thereafter taking into account appropriation and fund accounting requirements) any undisputed amounts due for all completed, approved, and accepted Services or deliverables.

(b) HHSC further agrees to negotiate in good faith with CONTRACTOR to equitably adjust and settle any accrued or outstanding liabilities for any unaccepted Service or deliverable and Change Order that

(1) Is due or delivered prior to or upon contract termination;

(2) Is complete or substantially complete, or for which the CONTRACTOR can document to the satisfaction of HHSC substantial progress; and

(3) Benefits HHSC or the State of Texas, notwithstanding its unaccepted status.

(c) CONTRACTOR must provide HHSC all reasonable access to records, facilities, and documentation as is required to efficiently and expeditiously close out the Services under this Agreement.

Section 14.16 *Rights and Obligations regarding Computer Programs, Systems and Data Files after Termination.*

The CONTRACTOR's rights and obligations with regard to any computer programs, systems and data files after termination are as set out at Article 13 of this Agreement.

Section 14.17 *Dispute resolution.*

(a) *General agreement of the Parties.*

The Parties mutually agree that the interests of fairness, efficiency, and good business practices are best served when the Parties employ all reasonable and informal means to resolve any dispute under this Agreement. The Parties express their mutual commitment to using all reasonable and

informal means of resolving disputes including, but not limited to, the informal review of liquidated damage assessments under Section 14.02 of this Agreement, prior to invoking a remedy provided elsewhere in this Section 14.17.

(b) *Duty to negotiate in good faith.*

Any dispute that in the judgment of any Party to this Agreement may materially or substantially affect the performance of any Party will be reduced to writing and delivered to the other Party. The Parties must then negotiate in good faith and use every reasonable effort to resolve such dispute and the Parties shall not resort to any formal proceedings unless they have reasonably determined that a negotiated resolution is not possible. The resolution of any dispute disposed of by agreement between the Parties shall be reduced to writing and delivered to all Parties within ten (10) business days.

(c) *Claims for breach of Agreement.*

(1) *General requirement.* As required by Chapter 2260, Government Code, a claim for breach of this Agreement by CONTRACTOR must be resolved in accordance with the dispute resolution process established by HHSC in accordance with Chapter 2260, Government Code.

(2) *Negotiation of claims.* A claim for breach of this Agreement by CONTRACTOR that the Parties cannot resolve in the ordinary course of business or through the use of all reasonable and informal means must be submitted to the negotiation process provided in Chapter 2260, subchapter B, Government Code.

(A) To initiate the process, CONTRACTOR must submit written notice in accordance with Section 4.04 of this Agreement that specifically states that CONTRACTOR invokes the provisions of Chapter 2260, subchapter B, Government Code.

(B) Compliance by the contractor with Chapter 2260, subchapter B, Government Code, is a condition precedent to the filing of a contested case proceeding under Chapter 2260, subchapter C, of the Government Code.

(3) *Contested case proceedings.* The contested case process provided in Chapter 2260, subchapter C, Government Code, is CONTRACTOR's sole and exclusive process for seeking a remedy for any and all alleged breaches of contract by HHSC if the Parties are unable to resolve their disputes under Subsection (d)(2) of this Section 14.17.

(A) Compliance with the contested case process provided in Chapter 2260, Subchapter C, Government Code, is a condition precedent to seeking consent to sue from the Texas Legislature under Chapter 107, Civil Practices & Remedies Code. Neither the execution of this Agreement by HHSC nor any other conduct of any representative of HHSC relating to this Agreement shall be considered a waiver of the State's sovereign immunity to suit.

(4) *HHSC rules.* The submission, processing and resolution of the CONTRACTOR's claim is governed by the rules to be adopted by HHSC pursuant to Chapter 2260, Government Code.

(A) CONTRACTOR expressly acknowledges that, as of the Effective Date of this Agreement, HHSC has not adopted rules to implement the requirements of Chapter 2260, Government Code. CONTRACTOR expressly waives any claim regarding the absence of any such rules at the Effective Date.

(5) *CONTRACTOR's duty to perform.* Neither the occurrence of an event constituting an alleged breach of contract nor the pending status of any claim for breach of contract is grounds for the suspension of performance, in whole or in part, by CONTRACTOR of any duty or obligation with respect to the Services under this Agreement.

Section 14.18 Liability of contractor.

CONTRACTOR will not be liable to HHSC for any loss, damages or liabilities attributable to or arising from:

(1) The failure of HHSC or any state agency or HHSC CONTRACTOR to perform a service or activity in connection with this Agreement; or

(2) CONTRACTOR's prudent and diligent performance of the Services in compliance with instructions given by HHSC in accordance with Section 2.06 (relating to implied authority), Section 4.04 (relating to notices), and Section 4.06 (relating to delegation of authority) of this Agreement.

Article 15. ASSURANCES AND CERTIFICATIONS

Section 15.01 Lobbying.

(a) In accordance with 31 U.S.C. § 1352 (§ 1352 of Public Law [P.L.] 101-121 effective December 22, 1989), CONTRACTOR is prohibited from using funds granted under this Agreement for lobbying Congress or any Federal agency in connection with a particular Agreement. CONTRACTOR agrees that none of the funds provided under this Agreement will be so used.

(b) In addition, if at any time a contract exceeds \$100,000, the law requires certification that none of the funds provided by HHSC to CONTRACTOR have been used for payment to lobbyists. CONTRACTOR certifies that it has not and will not use any funds provided under this Agreement for such prohibited purposes.

(c) Regardless of funding source, if a Contract Attachment exceeds \$100,000, CONTRACTOR will provide to HHSC a certification of the names of any and all registered lobbyists with whom CONTRACTOR has an agreement. CONTRACTOR agrees that it will provide this certification on

a form provided by HHSC, along with the names of any lobbyists, if applicable, within 90 days of receipt of the executed Agreement.

Section 15.02 *Debarment and suspension.*

(a) CONTRACTOR certifies by execution of this Agreement that it is not now ineligible for participation in Federal or State assistance programs under Executive Order 12549, Debarment and Suspension.

(b) CONTRACTOR certifies by execution of this Agreement that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.

(c) Where CONTRACTOR is unable to certify to any of the statements in this certification, CONTRACTOR shall attach an explanation.

(d) CONTRACTOR specifically warrants that it has not knowingly failed to pay a single substantial debt or a number of outstanding debts to a Federal or State agency and it is not subject to an outstanding judgment in a suit against CONTRACTOR for collection of the balance. A false statement regarding CONTRACTOR's status will be treated as a material breach of this Agreement and may be grounds for termination at the option of HHSC.

Section 15.03 *Conflicts of interest.*

(a) Representation.

CONTRACTOR agrees in its Proposal to comply with regulations regarding conflicts of interest in the performance of its duties under this Agreement.

(b) General duty regarding conflicts of interest.

CONTRACTOR will establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain. CONTRACTOR will operate with complete independence and objectivity without actual, potential or apparent conflict of interest with respect to the activities conducted under this Agreement with the State of Texas.

(c) Disclosure requirements.

(1) CONTRACTOR must disclose any existing or potential conflicts of interest relative to the performance requirements of this Agreement and must comply with other disclosure requirements set out below, as applicable.

(2) Any relationship that might be perceived or represented as a conflict must be disclosed by CONTRACTOR within 15 calendar days of its discovery by CONTRACTOR or by HHSC as a potential conflict. This disclosure requirement is a continuing obligation throughout the Initial Term of this Agreement and any extension of this Agreement.

(3) By submitting a Proposal in response to the RFP, CONTRACTOR affirmed that it has neither given, nor intends to give, at any time hereafter, any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant or any employee or representative of same, at any time during the procurement process or in connection with the procurement process except as allowed under relevant state and federal law.

(4) In addition, it is the responsibility of CONTRACTOR to request, in writing, a determination by HHSC when there is a question as to whether a conflict exists. HHSC reserves the right to make a final determination regarding conflict of interest with respect to CONTRACTOR's relationship with other parties whether individual or corporate, public or private, and CONTRACTOR agrees to abide by HHSC's decision.

(5) A violation of the disclosure requirements applicable to this Agreement may constitute grounds for the immediate termination of this Agreement. Furthermore, such violation may be submitted to the Office of the Attorney General, Texas Ethics Commission, or appropriate State or Federal law enforcement officials for further action.

Section 15.04 *Certification regarding good faith effort.*

HHSC is committed to making a good faith effort to assist Historically Underutilized Businesses (HUBs) through the contract award process in a manner consistent with rules prescribed by the General Services Commission (GSC) at 1 T.A.C. 111.11 *et seq.* The GSC has established a goal of a minimum 33 percent (33%) HUB participation in non-professional services contracts, either through direct contracting or through prime or general contractors' subcontracting efforts. HHSC is required to establish that CONTRACTOR has complied with this good faith effort. The CONTRACTOR has completed or shall complete required documentation of good faith effort on forms and in the manner prescribed by HHSC. The CONTRACTOR shall comply with continuing reporting requirements imposed by HHSC or the General Services Commission.

Section 15.05 *Child support certification.*

In accordance with Section 231.006, Family Code, CONTRACTOR certifies the following:

"Under Section 231.006, Family Code, the vendor or applicant certifies that the individual or business entity named in this Agreement, bid, or application is not ineligible to receive the specified grant, loan, or payment, and acknowledges that this Agreement may be terminated and payment withheld if this certification is inaccurate."

Section 15.06 *Texas Corporate Franchise Tax Certification.*

CONTRACTOR has certified that it is not delinquent in payments or obligations due or owing for state franchise taxes by executing the form entitled "Texas Corporate Franchise Tax Certification" contained in its Proposal.

Section 15.07 *Certification regarding status of license, certificate, or permit.*

Article IX, Section 163 of the General Appropriations Act for the 1998/1999 state fiscal biennium prohibits an agency which receives an appropriation under either Article II or V of the General Appropriations Act from awarding a Agreement with the owner, operator, or administrator of a facility which has had a license, certificate, or permit revoked by another Article II or V agency. CONTRACTOR certifies it is not ineligible for an award under this provision.

Section 15.08 *Outstanding debts and judgments.*

CONTRACTOR certifies that it is not presently indebted to the State of Texas, and that CONTRACTOR is not subject to an outstanding judgment in a suit by the State of Texas against CONTRACTOR for collection of the balance. For purposes of this section, an indebtedness is any amount sum of money that is due and owing to the State of Texas and is not currently under dispute. A false statement regarding CONTRACTOR's status will be treated as a material breach of this Agreement and may be grounds for termination at the option of HHSC.

Section 15.09 *Unauthorized acts.*

Each Party agrees to:

- (1) Notify the other Party promptly of any unauthorized possession, use, or knowledge, or attempt thereof, of any Confidential Information by any person or entity that may become known to it;
- (2) Promptly furnish to the other Party full details of the unauthorized possession, use, or knowledge, or attempt thereof, and use reasonable efforts to assist the other Party in investigating or preventing the reoccurrence of any unauthorized possession, use, or knowledge, or attempt thereof, of Confidential Information;
- (3) Cooperate with the other Party in any litigation and investigation against third Parties deemed necessary by such Party to protect its proprietary rights; and
- (4) Promptly prevent a reoccurrence of any such unauthorized possession, use, or knowledge of Confidential Information.

Section 15.10 *Legal action.*

Neither party may commence any legal action or proceeding in respect to any unauthorized possession, use, or knowledge, or attempt thereof, of Confidential Information by any person or entity which action or proceeding identifies the other Party or its Confidential Information without such Party's consent.

Article 16. REPRESENTATIONS AND WARRANTIES.

EXCEPT AS SPECIFIED IN THIS ARTICLE 16 AND ARTICLE 2, CONTRACTOR MAKES NO WARRANTIES AND DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE IN RESPECT TO THE SERVICES OR DELIVERABLES.

Section 16.01 Authorization.

(a) CONTRACTOR is a corporation duly incorporated, validly existing and in good standing under the laws of its state of incorporation and has all requisite corporate power and authority to execute, deliver and perform its obligations under this Agreement.

(b) The execution, delivery and performance of this Agreement has been duly authorized by CONTRACTOR and no approval, authorization or consent of any governmental or regulatory agency is required to be obtained in order for CONTRACTOR to enter into this Agreement and perform its obligations under this Agreement.

(c) CONTRACTOR is duly authorized to conduct business in and is in good standing in each jurisdiction in which CONTRACTOR will conduct business in connection with this Agreement.

(d) CONTRACTOR has obtained all licenses, certifications, permits, and authorizations necessary to perform the Services under this Agreement and currently is in good standing with all regulatory agencies that regulate any or all aspects of CONTRACTOR's performance of the Services. CONTRACTOR will maintain all required certifications, licenses, permits, and authorizations during the term of this Agreement.

Section 16.02 Ability to perform.

(a) CONTRACTOR has the financial stability to carry out at least six (6) months of operations during any period of this Agreement without reimbursement for services or expenses.

(b) CONTRACTOR has the financial resources to fund the capital expenditures required under the Agreement without advances by HHSC or assignment of any payments by HHSC to a financing source.

(c) CONTRACTOR represents that each subcontractor providing a substantial amount of services under this Agreement has the financial resources to carry out its duties under this Agreement.

(d) CONTRACTOR's methods of accounting are consistent with generally accepted accounting principles and are capable of segregating costs by project, phase, stage, or cost objective in order to support change-order accounting.

Section 16.03 *Workmanship and performance.*

(a) All Services and Deliverables provided under this Agreement will be provided in a manner consistent with the highest standards of quality and integrity.

(b) All Services and Deliverables must meet or exceed the levels of performance specified in or pursuant to this Agreement.

(c) CONTRACTOR will perform the Services in a workmanlike manner, in accordance with best practices and high professional standards.

Section 16.04 *Compliance with laws.*

CONTRACTOR will comply with all applicable local, state and Federal laws and regulations in providing the Services and must have and maintain all applicable permits, rights and licenses to perform the Services.

Section 16.05 *Compliance with Agreement.*

CONTRACTOR will not take any action inconsistent with any of the terms and conditions set forth in this Agreement without the express written approval of HHSC.

Section 16.06 *Conflict of interest or lobbying.*

CONTRACTOR has no present interest and will not acquire any interest that would conflict in any manner with its duties and obligations under this Agreement. CONTRACTOR has not used and will not use any efforts to lobby any member of the executive or legislative branch of the State with respect to obtaining this Agreement or changing any obligations or terms of the Agreement during its Term.

Section 16.07 *Contingent fee arrangements.*

CONTRACTOR warrants that no person or agency, other than a bona fide regular employee or bona fide commercial agency has been employed or retained to solicit or obtain this Agreement upon a contract or understanding for a contingent fee.

Section 16.08 *Proselytizing.*

The CONTRACTOR and HHSC mutually agree that neither party will intentionally solicit, recruit, induce, or persuade any employee of the State of Texas who is assigned to provide assistance or services to the CHIP program in connection with this Agreement to become an employee or agent of the CONTRACTOR, and vice versa, during the term of this Agreement and for one-year following the termination of this Agreement.

Article 17. MISCELLANEOUS PROVISIONS

Section 17.01 *Entire agreement.*

This Agreement and each of the documents and inducements that are incorporated by reference into this Agreement, represent the entire agreement between the Parties with respect to its subject matter, and there are no other representations, understandings, or agreements between the Parties relative to such subject matter.

Section 17.02 *Covenant of further assurances.*

HHSC and the CONTRACTOR covenant and agree that, subsequent to the execution and delivery of this Agreement and without any additional consideration, HHSC and the CONTRACTOR will execute and deliver any further legal instruments and perform any acts which are or may become reasonably necessary to effectuate the purposes of this Agreement.

IN WITNESS HEREOF, HHSC and the CONTRACTOR have each caused this Agreement to be signed and delivered by its duly authorized representative.

Sherry Matthews, Incorporated

By: _____
Sherry Matthews
President

Date: _____

By: _____
Don A. Gilbert, M.B.A.
Commissioner

Date: _____

Health & Human Services Commission

Exhibit A
CONTRACTOR's Proposal

Exhibit B
Modifications to CONTRACTOR's Proposal

Exhibit C

Schedule of Value-Added Services

**Children's Health Insurance Plan
Media/Marketing Services Agreement
Schedule of Value-Added Services**

CONTRACTOR will provide the following services and/or deliverable as value-added services under this Agreement:

A. CHIP Application Booklet Printing

1. CONTRACTOR will handle all tasks related to securing printing services for the CHIP application booklet at a rate not to exceed \$60 per hour.
2. CONTRACTOR will submit invoices to HHSC for the printing of CHIP application booklets in an amount that reflects its direct and actual cost for the printing of such booklets.
3. The number of application booklets that may be authorized for printing during the term of this Agreement may not exceed 2,5000,000 booklets.
4. Unless otherwise agreed to by HHSC, the initial application booklet printing will be completed no later than February 25, 2000.

B. CHIP Community-based Organization ("CBO") Handbook Development

1. CONTRACTOR will handle all tasks related to securing printing services for the CHIP-CBO handbook at a rate not to exceed \$60 per hour.
2. On request and subject to direction of HHSC, CONTRACTOR will develop text and content for the CHIP CBO handbook at a rate not to exceed \$125.00 per hour.
3. For purposes of this value-added service and if requested by HHSC, development will include printing of CBO handbooks.
 - a. If HHSC requests or authorizes the printing of the CHIP CBO Handbook, CONTRACTOR will submit invoices for the printing of any such handbooks in an amount that reflects its direct and actual cost for the printing of such handbooks.
 - b. The number of CHIP CBO handbooks that may be authorized for printing during the term of this Agreement may not exceed 100,000 booklets.

Exhibit D
Health & Human Services Commission,
Children's Health Insurance Plan,
Media/Marketing Services Request for Proposal

